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Nos. 04-551 and 04-552

Supreme Court, U.S.
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In The
Supreme Court of the United States

DAVID F. ALBRIGHT,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

MORTON L. GINSBERG,

Petitioner,

v.

NEIGHBORHOOD DEVELOPMENT COLLABORATIVE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent, Neighborhood Development Collaborative ("NDC"), a non-profit provider of affordable rental housing, by its undersigned counsel, submits this Brief in Opposition to Petitions for Writ of Certiorari opposing two related Petitions for Writ of Certiorari filed, respectively, by Petitioners Morton L. Ginsberg ("Ginsberg") and David F. Albright ("Albright").

Petitioners assert that the Court should review the decisions of the United States District Court for the District of Maryland and the United States Court of Appeals for the Fourth Circuit, which among other findings rejected Petitioner Ginsberg's claim that the summons issued in this case was deficient and thus denied his motion to dismiss. Petitioners claim that the lower court decisions conflict with relevant decisions of this Court and "so far depart" from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

The Petition should be denied because the lower courts properly found that the summons served on Ginsberg complied with Fed. R. Civ. P. 12(a), which requires that an answer be filed within 20 days of service of process, and did not need to provide the 60-day response period that would have applied had this diversity of citizenship action been filed in state court. Moreover, the lower court decisions are consistent with this Court's precedent.

STATEMENT OF THE CASE

The record shows that on April 19, 2002, NDC borrowed $750,000 from Ginsberg pursuant to a Loan Agreement and a Promissory Note having a maturity date of October 19, 2002 (the "Loan"). J.A. 56-60. The Promissory Note provides that NDC was to pay Ginsberg on the maturity date the principal amount, plus $100,000 as a "lump sum payment of all interest, loan fees and costs." J.A. 59 (emphasis added). The Promissory Note further provides that

> [f]rom the *day after* the maturity of this Note until paid in full, the Borrower [NDC] shall pay to the Lender [Ginsberg] upon demand by the Lender interest on the unpaid balance of the Principal Amount at the per annum rate of interest equal to thirty percent (30%) per annum.

Id. (emphasis added).

NDC was unable to pay off the Loan at maturity and Ginsberg declared a default. J.A. 64. During the Spring of 2003, NDC sought a payoff figure from Ginsberg so that it could pay off the Loan. J.A. 65. Ginsberg refused to provide a payoff figure consistent with the express terms of the loan documents, insisting instead that he was owed $146,455 more than the loan documents required. *Id.*

As of June 12, 2003, the proper payoff figure for the Loan pursuant to the express terms of the Promissory Note and Loan Agreement was $955,552. J.A. 65. NDC offered to pay this sum to Ginsberg in exchange for a release of Ginsberg's lien, but Ginsberg refused. J.A. 65-66. Faced with Ginsberg's refusal to accept a payoff amount that comported with the terms of the loan documents, NDC filed this declaratory judgment action. J.A. 4.

Ginsberg moved to dismiss the complaint, claiming that the court lacked personal jurisdiction over him. J.A. 4, 26-28. Among other arguments, Ginsberg claimed that the summons was deficient because it required that he serve a responsive pleading within 20 days of service, as mandated by Fed. R. Civ. P. 12(a). Specifically, Ginsberg asserted that Fed. R. Civ. P. 4(k)(1)(A) requires that in a diversity action such as this, where a defendant is served outside Maryland, the defendant should be permitted 60 days to answer the complaint, as provided in Maryland Rule 2-321(b), instead of 20 days as required by Rule 12(a). Further, Ginsberg asserted that because the summons provided that an answer was required to be filed within 20 days, service and process were deficient and thus the district court lacked personal jurisdiction. *Id.*

NDC filed a motion for summary judgment on July 17, 2003. J.A. 5. In that motion, NDC argued that the Loan Agreement and Promissory Note provided a clear and unambiguous formula for calculating the payoff amount, and resulted in a payoff figure of $955,552. J.A. 48-54. Ginsberg opposed the motion, arguing that the $100,000 lump sum payment constituted a form of "discount" on the otherwise applicable costs of the Loan, which was conditioned on NDC timely paying off the Loan by the maturity date. J.A. 72. In light of NDC's payment default, Ginsberg claimed that the 30% default interest rate should be charged retroactively to the date of the Loan, not from the date of the default. *Id.*

On September 3, 2003, the district court denied Ginsberg's motion to dismiss, describing Ginsberg's insufficient process claim as "frivolous." J.A. 107. On the merits, the district court granted summary judgment in favor of NDC, holding that the Loan Agreement and

Promissory Note were clear and unambiguous, and provided a payoff figure in accordance with NDC's calculation. J.A. 105. The court rejected Ginsberg's "discount" argument, stating that "[t]he problem with Ginsberg's contention, of course, is that the parties' agreement says no such thing." J.A. 105.

On October 16, 2003, NDC filed a post-judgment motion for sanctions under Fed. R. Civ. P. 11, seeking sanctions against Ginsberg, Albright, and Albright & Goertemiller, LLC. J.A. 7, 153-166. The district court granted in part and denied in part the motion for sanctions. J.A. 228. While the court declined to award attorneys' fees as a monetary sanction, the court reprimanded Ginsberg's attorneys, stating:

> Not only do I adhere to my previously-expressed view that much of defendant's contentions in this peculiar case were "frivolous" and "spurious," even more fundamentally, I find defense counsel's performance in this case is, with all due respect, an embarrassment to him, his firm and his client. In my view, under the unique circumstances presented here, this finding is an adequate "sanction."

J.A. 228. The district court added: "I note that [Ginsberg] has taken an appeal; I presume that [NDC] will seek sanctions from the Fourth Circuit. From the perspective of this court, monetary sanctions on appeal would certainly be appropriate." *Id.*

Ginsberg and Albright appealed separately. These appeals were consolidated on motion by NDC, and the Fourth Circuit issued a one-paragraph *per curiam* opinion

affirming the district court's decision.[1] NDC filed a motion for sanctions under Fed. R. App. P. 38, which is fully briefed and pending in the Fourth Circuit.

REASONS FOR DENYING THE WRIT

The Petitions should be denied for several reasons. First, the lower courts did not depart from the accepted and usual course of judicial proceedings. Rather, they properly found that the summons served on Ginsberg complied with the express requirements of Fed. R. Civ. P. 12(a). Second, the decisions below do not, as Petitioners claim, conflict with a relevant decision of this Court. Finally, Petitioners have asserted no compelling basis for reviewing the lower court's sanction order.

1. The Petitions should be denied because the lower court has not "far departed from the accepted and usual course of judicial proceedings."

Petitioners claim that the lower court has "far departed from the accepted and usual course of judicial proceedings" by requiring Ginsberg – an out of state defendant served with a complaint filed in the District of Maryland based on diversity of citizenship – to respond to the complaint within 20 days after service, rather than the 60-day response time he would have received had the case been filed in a Maryland state court. This claim has no merit.

[1] On December 15, 2003, while these appeals were pending, NDC paid Ginsberg $955,582 (the payoff amount the district court determined was owed) and Ginsberg released his lien.

Rule 12(a)(1) of the Federal Rules of Civil Procedure provides, in pertinent part, that "[u]nless a different time period is prescribed in a statute of the United States, a defendant shall serve an answer . . . within 20 days after being served with the summons and complaint." Where, as here, no statute prescribes a different time period to answer, Rule 12(a) is susceptible to only one possible interpretation – that a defendant in a case such as this is afforded only 20 days to respond to a complaint. This is true irrespective of whether service is effected pursuant to federal or state law, and whether the case is based on federal question or diversity jurisdiction.

Rule 12(a) once provided explicitly for an extended answer period if service was effected under state law. Before being amended in 1993, Rule 12(a) stated, in pertinent part, that "[a] defendant shall serve an answer within 20 days after the service of the summons and complaint upon the defendant, *except when service is made under Rule 4(e) [permitting service pursuant to state law] and a different time is prescribed . . . in the statute or rule of court of the state.*" Fed. R. Civ. P. 12(a) (1992) (emphasis added).

The language permitting courts to borrow time periods from state law, however, was eliminated in the 1993 amendment to Rule 12(a). In purging this language, the Advisory Committee on Civil Rules explained that it sought "nationwide uniformity with respect to the form and content of a summons." *See Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure*, 127 F.R.D. 237, 306-03 (1989), *rule published in final form*, 146 F.R.D. 401 (1993) (noting that "[s]ubdivision (a) [of Rule

12] is amended to strike the reference to state law with respect to the time for answer").

Because the relief sought by Petitioners contradicts the plain language of Rule 12 (a fact ignored in the Petitions), Petitioners' claim that the lower court has "far departed from the accepted and usual course of judicial proceedings" is specious.

2. The Petitions should be denied because the lower court decisions do not conflict with this Court's precedent.

This Court has not considered whether the unambiguous 20-day response period in Rule 12(a) may be avoided in a diversity action. Moreover, the one circuit to address this issue has rejected the notion that a defendant who is served pursuant to a state law method of service can exceed the 20-day response time set forth in Rule 12(a), even where the state law provides a longer time in which to answer. *See Beller & Keller v. Tyler*, 120 F.3d 21, 25-26 (2d Cir. 1997) (rejecting claim that default judgment was void because it was entered before the time to answer had expired, and finding that while the Federal Rules authorize the use of a state's "nail and mail" method of service, they do not permit a defendant to borrow the response times included in the state law).

Nevertheless, ignoring the plain language of Rule 12(a), the 1993 amendment to that rule, and the *Beller & Keller* decision, Petitioners claim that Fed. R. Civ. P. 4(k)(1)(A) mandates that he should have been given 60 days to respond to the complaint, and that the lower court decisions contradict decisions of this Court interpreting Rule 4(k)(1). However, neither the language of Rule 4(k)(1)

nor this Court's precedent supports Petitioners' contention.

Rule 4(k)(1) provides, in pertinent part, that "[s]ervice of a summons . . . is effective to establish jurisdiction over the person of a defendant (A) who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." The notes of the Advisory Committee on Civil Rules provide that Rule 4(k)(1) "explicitly authoriz[es] the exercise of personal jurisdiction over persons who can be reached under state long-arm law, the '100-mile bulge' provision added in 1963, or the federal interpleader act." Fed. R. Civ. P. 4(k), Advisory Committee's Note.

Although Rule 4(k)(1) authorizes personal jurisdiction over defendants such as Ginsberg who can be reached under a state long-arm statute, this rule does not specify a time period for service that must be followed to effectuate jurisdiction. Neither the text of Rule 4(k)(1), nor the Advisory Committee's note, references any service or process requirements. There simply is no basis in the text of Rule 4(k), or elsewhere, for arguing that this rule mandates application of Maryland's 60-day response period. Indeed, as noted above, this argument directly contradicts the plain language of Rule 12(a).

Petitioners claim that the lower court decisions contradict this Court's decision in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980), as well as the Fourth Circuit's decision in *Wade v. Danek Medical, Inc.*, 182 F.3d 281 (4th Cir. 1999). This simply is not so.

In *Walker*, this Court considered whether Fed. R. Civ. P. 3 conflicted with an Oklahoma statute that required service of process to be effected before the statute of

limitations would be tolled. 446 U.S. at 748-49. Petitioners claim that the *Walker* court "determined that the State's rule as to when a case commences would control and override Federal Rule 3." Ginsberg Petition at 4; Albright Petition at 4. Petitioners have misstated the holding in *Walker*. In fact, *Walker* supports the district court's holding that Rule 12(a)'s 20-day answer period controls.

Walker addressed a situation where federal and state rules were *not* in direct conflict.[2] Here, Rule 12(a) and the Maryland rule that provides 60 days to answer a state court lawsuit are in direct conflict because the time by which an answer must be filed is expressly addressed in both rules. Under this circumstance, *Walker* makes clear that an analysis must be performed under *Hanna v. Plumer*, 380 U.S. 460 (1965). *Id.* at 748.

In *Hanna*, this Court explained that where a federal rule is clearly in conflict with a state rule, the federal rule applies so long as it is within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and within a constitutional grant of power such as the Necessary and Proper Clause of Article I of the United States Constitution. 380 U.S. at 470-72.

Petitioners have made no effort to show, and cannot show, that Rule 12(a) does not meet these requirements. The Rules Enabling Act authorizes this Court to "prescribe general rules of practice and procedure . . . in the

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[2] Noting that "Rule 3 simply states that '[a] civil action is commenced by filing a complaint with the court,'" the *Walker* court found that "[t]here is no indication that the Rule was intended to toll a state statute of limitations." *Id.* at 750. The *Walker* court thus concluded that the federal and state rule "each controll[ed] its own intended sphere of coverage without conflict." *Id.* at 752.

United States district courts," provided such rules do "not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a) and (b). The test for compliance with the Rules Enabling Act and the Constitution does not require that a rule be outcome-neutral (i.e., that it affect no rights of the litigants). As the *Hanna* court stated:

> "Undoubtedly most alterations of the rules of practice and procedure may and often do affect the rights of litigants. Congress' prohibition of any alteration of substantive rights of litigants was obviously not addressed to such incidental effects as necessarily attend the adoption of the prescribed new rules of procedure upon the rights of litigants who, agreeably to rules of practice and procedure, have been brought before a court authorized to determine their rights. The fact that the application of Rule 4(f) will operate to subject petitioners' rights to adjudication by the district court . . . will undoubtedly affect those rights. But it does not operate to abridge, enlarge or modify the rules of decision by which that court will adjudicate its rights."

Id. at 464-65 (quoting *Mississippi Pub. Corp. v. Murphee*, 326 U.S. 438, 445-46 (1946) (assessing the validity of Fed. R. Civ. P. 4(f) under the Rules Enabling Act) (internal citations deleted)).

Rule 12(a), which merely provides a time period (20 days) within which an answer must be filed, is undeniably a "general rule of practice and procedure" within the meaning of the Rules Enabling Act. Accordingly, under the *Hanna/Walker* analysis described above, Rule 12(a) applies over a conflicting state court rule of procedure such as Maryland Rule 2-321(b) in a federal diversity action such as this.

Wade v. Danek Medical, Inc., 182 F.3d 281 (4th Cir. 1999), also is inapposite. In *Wade*, the Fourth Circuit held that Virginia's rule against equitable tolling, rather than the federal rule, applied. *Id.* at 290. Relying in part on *Walker*, the *Wade* court reasoned that "in any case in which a state statute of limitations applies – whether because it is borrowed in a federal question action or because it applies under *Erie* in a diversity action – the state's accompanying rule regarding equitable tolling should also apply." *Id.* at 289. The *Wade* holding is relevant only to rules that constitute "'an integral part of the statute of limitations.'" *Id.* at 288 (quoting *Walker*, 446 U.S. at 753). Rule 12(a) is not such a rule.[3]

3. Albright's Petition should be denied because he has failed to present a compelling reason for this Court to review the sanction order issued by the district court and upheld on appeal upon a finding that Petitioners' arguments were frivolous and spurious.

Petitioner Albright contends that his Petition should be granted because "the sanctions must be vacated" "upon a showing that said jurisdictional arguments are not frivolous." Albright Petition at 5. For the reasons explained above, however, the district court "got it right" when it rejected Petitioners' substantive arguments below,

[3] Without discussion, Petitioners assert that failing to review the lower court decisions will encourage forum shopping. This claim is meritless. This Court in *Hanna* noted that a procedural rule that does not "wholly bar recovery" but rather only results in procedural differences such as the manner in which process is served has "scant, if any, relevance to the choice of a forum." 380 U.S. at 469. Rule 12(a) is such a rule.

finding them to be "frivolous" and "spurious." Moreover, asserting that a lower court decision was incorrect, even if true, is not a "compelling reason" to grant a petition for a writ of certiorari, which is "rarely granted when the asserted error consists of erroneous factual findings." *See* Sup. Ct. R. 10.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that the Petitions for a Writ of Certiorari filed by Petitioners be denied.

Respectfully submitted,

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